


FILED
COURT OF APPEALS
DIVISION II
2013 AUG 19 AM 9:46
STATE OF WASHINGTON
BY 
DEPUTY

No. 43578-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Scott Newcomb,
Appellant.

BRIEF OF RESPONDENT

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY
WSBA #16163

OFFICE ADDRESS:
P.O. BOX 45
SOUTH BEND, WA 98586
(360) 875-9361

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
A. STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
B. STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
C. STATEMENT OF THE CASE.....	3
D. ARGUMENT	9
E. CONCLUSION	28

TABLE OF AUTHORITIES

Federal Cases

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	9,10,11,12
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).....	11

Washington State Cases

<u>State v. Abd-Rahman</u> , 154 Wash. 2d 280, 111P. 3d 1157 (2005).....	17
<u>State ex rel. Carroll v. Junker</u> , 79 Wash. 2d 12, 482 P. 2d 775 (1971).....	21
<u>State v. Collins</u> , 76 Wash. App. 496, 886 P. 2d 243 (1995)....	11,12
<u>State v. Davis</u> , 154 Wash. 2d 291, 111 P. 3d 844 (2005)..	12,13
<u>State v. Davison</u> , 116 Wash. 2d 917, 809 P. 2d 1374 (1991).....	22,24,25
<u>State v. Griffith</u> , 164 Wash. 2d 960, 195 P. 3d (2008).....	22
<u>State v. Jasper</u> , 174 Wash. 2d 96, 271 P. 3d 876 (2012)...	11

<u>State v. Kisor</u> , 68 Wash. App. 610, 844 P. 2d 1038 (1993).....	18,20
<u>State v. Mark</u> , 36 Wash. App. 428 675 P. 2d 1250 (1984).....	21
<u>State v. Newcomb</u> , 160 Wash. App. 184, 246 P. 3d 1286 (2011).....	7
<u>State v. Newman</u> , 4 Wash App. 558, 484 P. 2d 473 (1971).....	9,10
<u>State v. Pollard</u> , 66 Wash. App. 779, 834 P. 2d 51 (1992)	17,18,20
<u>State v. Smith</u> , 148 Wash. 2d 122, 59 P. 3d 74 (2002)	13
<u>State v. Tatum</u> , 58 Wash. 2d 73, 360 P. 2d 754 (1961).....	10
<u>State v. Tobin</u> , 161 Wash. 2d 517, 166 P. 3d 1167 (2007)...	22
<u>United States Constitution</u>	
Sixth Amendment	1, 12
Fourteenth Amendment	1
<u>Statutes</u>	
RCW 9.94A.543(3).....	21,22,24,28

Other Regulations

ER 801(a)11

A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF
ERROR

1. The trial court did not violate Mr. Newcomb's Sixth and Fourteenth Amendment right to confront witnesses.
2. The trial court did not improperly admit testimonial evidence.
3. Mr. Newcomb had a sufficient opportunity to contest the admissibility of photographs offered by the State; Mr. Newcomb's constitutional rights were not violated.
4. The trial court did not err by ordering Mr. Newcomb to pay \$13,000 in restitution.
5. The trial court did not err by entering Finding of Fact No. 2. CP 3.
6. The trial court did not err by entering Finding of Fact No. 6. CP 4.
7. The trial court did not err by entering Finding of Fact No. 11. CP 4.
8. The trial court did not err by adopting Conclusion of Law No. 1. CP 4.

9. The trial court did not err by adopting Conclusion of Law No. 2. CP 4.
10. The trial court did not err by entering Finding of Fact No. 7. CP 25.
11. The trial court did not err by entering Finding of Fact No.11. CP 26.
12. The trial court did not err by adopting Conclusion of Law No. 4. CP 27.
13. The trial court did not err by adopting Conclusion of Law No. 5. CP 27.
14. The trial court did not err by adopting Conclusion of Law No. 8. CP 27.
15. The trial court did not err by entering Conclusion of Law No. 8. CP 26.

B.

**STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

1. In admitting photographs into evidence, the trial court did not violate Mr. Newcomb's right to confront witnesses against him.

2. The trial court's reliance on written estimates in determining the amount of restitution did not violate Mr. Newcomb's right to confront witnesses against him.
3. The trial court did not exceed its statutory authority in ordering restitution of \$13,000.

C.

STATEMENT OF THE CASE

In 2006, Timothy Kredlo purchased property along the South Palix Road near Bay Center in Pacific County. RP (5/16/12) at 198. In order to access his property, Mr. Kredlo needed to use an easement that crossed property owned by Scott Newcomb/Eileen Newcomb. RP (5/16/12) at 199. Prior to the commencement of the current case, the predecessors in interest to Mr. Kredlo sued Scott Newcomb and Eileen Newcomb (Mr. Newcomb's Mother) to ensure that the Newcombs did not interfere with the easement. The Pacific County Superior Court signed a decree preventing Mr. Newcomb and his mother from interfering with the easement.

State's Exhibit No. 18; See Appendix A. Mr. Newcomb refused to accept the legality of this decree and believed that he could deny access across his property. RP (5/16/12) at 200–201, 249–250, 252.

Mr. Kredlo had Mr. Daniel Bayne build a gravel road through the easement on Mr. Newcomb's property in 2006. RP (5/16/12) 62–64, 79. When Mr. Bayne returned to the road after it was completed, he observed that the road had been destroyed. The gravel had been removed and the road was a mess. RP (5/16/12) at 65. The gravel had been placed in a pile on Mr. Newcomb's property. Id. Mr. Kredlo confirmed the observations of Mr. Bayne. Mr. Kredlo stated that on October 16, 2006, he traveled to his property and observed that the road had been dug up with a big piece of equipment. According to Mr. Kredlo, the road had three to four foot moguls, and three large rootballs had been placed across the road. RP (5/16/12) at 207–208. The road was

impassible for vehicular traffic. RP (5/16/12) at 208. Mr. Kredlo noted that Mr. Newcomb was pushing gravel into piles close to the location of the damaged road. RP (5/16/12) at 208–209. Mr. Kredlo also saw vehicle tracks leaving the muddy road and going onto Mr. Newcomb's property. RP (5/16/12) at 209.

Mr. Kredlo became alarmed in part due to previous conversations he had with Mr. Newcomb. Around Labor Day 2006, Mr. Newcomb told Mr. Kredlo that he had bought a “sour lemon” because there was no access to the property. RP (5/16/12) at 200. When Mr. Kredlo pointed out that he had a recorded easement, Mr. Newcomb disputed the legality of the easement. While Mr. Newcomb acknowledged that he was aware that the Pacific County Superior Court had decreed that he could not interfere with the easement, Mr. Newcomb denied the validity of this order. RP (5/16/12) at 200–201. Mr. Newcomb indicated to Mr. Kredlo that he wanted to abandon the road and return the road to its original

condition. RP (5/16/12) at 201. Also, on October 13, 2006, three days before Mr. Kredlo discovered the extensive damage to the road, Mr. Kredlo observed Mr. Newcomb on a bucket loader removing gravel from the road. RP (5/16/12) at 203–204.

Mr. Kredlo called the Pacific County Sheriff's Office on October 13, 2006. RP (5/16/12) at 104. The Sheriff's Office responded to the scene on October 13, 2006. The Sheriff's Office also was at the scene on October 14–15. RP (5/16/12) at 110, 118. While investigating the scene, Sheriff deputies took photographs and made observations. RP (5/16/12) at 110–126, 132–150.

The State charged Mr. Newcomb with malicious mischief in the first degree. The State alleged that on or about October 13, 2006 through October 16, 2006, Mr. Newcomb in Pacific County, Washington, knowingly and maliciously caused physical damage to the property of another. See Appendix B.

Mr. Newcomb successfully moved to dismiss this case in arguing that a person cannot maliciously damage his own property. This initial decision by the trial court was appealed by the State. Division II of the Court of Appeals overturned the trial court's initial decision to dismiss this case in State v. Newcomb, 160 Wash. App. 184, 246 P. 3d 1286 (2011).

The case was returned to the Pacific County Superior Court. Mr. Newcomb agreed to a non-jury trial. Mr. Newcomb brought a pretrial motion to exclude law enforcement photographs based on a warrantless intrusion onto Mr. Newcomb's property. The trial court denied this motion. See Appendix C.

The photographs taken by law enforcement were admitted into evidence through the testimony of Officer Ryan Pearson. Officer Pearson did not take the photographs, but he provided the necessary foundation to have the photographs admitted into evidence. RP (5/16/12) at 102-124.

The trial court heard testimony concerning the nature of Mr. Newcomb's actions and the amount of damage incurred. The trial court found Mr. Newcomb guilty of malicious mischief in the first degree. See Appendix D.

The trial court sentenced Mr. Newcomb and then held a restitution hearing. The repair estimates to fix the road ranged from \$9,378.60 to \$21,484.54. See Appendix E. At the restitution hearing Mr. Kredlo also asked to be reimbursed for his travel trailer. Mr. Kredlo indicated that his travel trailer had been destroyed by mold, because he could not get power to the travel trailer due to the damage to the road. RP (10/5/12) at 3–5. The trial court disallowed this claim. The trial court arrived at a restitution figure of \$7,500 and then used the “doubling provision” of RCW 9.94A.753(3) to set the final restitution amount at \$13,000. RP (10/5/12) at 16.

Mr. Newcomb timely appealed.

D.

ARGUMENT

1. The trial court did not err in admitting photographs into evidence that pertained to the scene in question; these photographs are not subject to confrontation clause strictures.

The Appellant asserts that the photographs which were admitted into evidence constitute testimonial evidence. Because the police officer who took the photographs did not testify at the trial, the Appellant argues that his right to confrontation/cross-examination was violated under the holding of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Appellant's Brief at 6-9. This assertion is incorrect for the following reasons.

First, a photograph can be admitted into evidence when the authenticating witness is not the photographer. As stated in State v. Newman:

. . . it is only required that some witness, not necessarily the photographer, be able to give some indication as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portrays the subject illustrated, State v. Tatum, 58 Wash. 2d 73, 360 P. 2d 754 (1961). It is then admissible in the sound discretion of the trial court, . . .

4 Wash. App. 588, 593, 484 P.2d 473 (1971).

In this instance, Officer Ryan Pearson provided the necessary foundation to authenticate the eight photographs that were admitted into evidence RP (5/16/12) at 102–124. Defense counsel vigorously objected to the introduction of these photographs. Defense counsel also had the opportunity to ask Officer Pearson questions about his knowledge of the photographs and what they purported to show. Therefore, the Appellant did have the opportunity to cross-examine the State's witness; hence, there was no Crawford violation. In short, Crawford and its progeny have not changed the law as articulated in Newman. Once again,

the State is not required to produce the person who actually took the photographs. The Appellant was able to vigorously challenge the State's witness who provided the necessary foundation to admit the photographs. Thus, no confrontation clause challenge is meritorious.

Second, the photographs in question are not testimonial statements. Crawford concerned itself with statements made to the police. Other cases cited by the Appellant, e.g., Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and State v. Jasper, 174 Wash. 2d 96, 271 P. 3d 876 (2012), involve written statements that were admitted into evidence. In each instance a statement was at issue. Under the Rules of Evidence, "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." ER 801(a). Nothing is an assertion unless it is intended to be one. State v. Collins, 76 Wash. App. 496, 498,

886 P. 2d 243 (1995). In this case, the photographs admitted into evidence are not intended to be an assertion. They merely depict the relevant scene. They do not contain added written commentary which would constitute an assertion. Consequently, the photographs are not a testimonial statement which is within the ambit of Crawford. The Appellant's confrontation clause argument therefore fails to pass muster.

2. Assuming arguendo that the confrontation clause was violated, this purported error was harmless; hence, the guilty verdict should be upheld.

The Appellant argues that his conviction for malicious mischief in the first degree should be reversed because his right under the confrontation clause of the Sixth Amendment was violated. Appellant's Brief at 6-9. "A violation of the confrontation clause is . . . subject to harmless error analysis where the error was harmless beyond a reasonable doubt." State

v. Davis, 154 Wash. 2d 291, 304, 111 P. 3d 844 (2005). Assuming for the sake of argument that the failure to have the photographer testify at trial constitutes a confrontation clause violation, this purported error is harmless. An error is harmless if there is overwhelming untainted evidence that necessarily leads to a finding of guilt. State v. Smith, 148 Wash. 2d 122, 139, 59 P. 3d 74 (2002).

Irrespective of the admitted photographs, the victim, Timothy Kredlo, testified that Mr. Newcomb told Mr. Kredlo that his property was “a sour lemon” because there was no access. RP (5/16/12) at 200. Mr. Kredlo told Mr. Newcomb that there was a valid easement that gave Mr. Kredlo access to his property. Mr. Newcomb responded by saying that he was aware of a court order to that effect, but that State and Federal law were controlling, and that Mr. Kredlo had no access to his property. RP (5/16/12) at 200–201. Jeff Ammer, an employee of the Washington State

Department of Natural Resources, testified that Mr. Newcomb told him that he wanted to abandon the road by digging it up. (RP (5/16/12) at 249–250. Mr. Kredlo also testified that on October 13, 2006, he saw Mr. Newcomb on “a bucket loader” removing gravel from the road that had just been completed. RP (5/16/12) at 203–204. Mr. Kredlo further stated that on October 16, 2006, he came to the property and saw that the road had been dug up with a big piece of equipment that created three to four feet elevation changes. RP (5/16/12) at 207–208. According to Mr. Kredlo, there also were rootballs placed on the road which made it impossible for vehicles to proceed. RP (5/16/12) at 208. Mr. Kredlo also observed that additional gravel was piled on the easement and on Mr. Newcomb’s property. RP (5/16/12) at 208–209.

Furthermore, relevant deeds were introduced into evidence, and a survey of the relevant property was admitted. RP (5/17/12)

at 8–9. Walter Ruef, the individual who prepared the survey, testified regarding the placement of the easement. RP (5/17/12) at 2–25. Finally, although there was some confusion regarding the amount of damage to the road, the testimony at trial clearly indicated that the amount of damage was more than \$1500, which was the threshold value for malicious mischief in the first degree at the time of the incident in 2006. RP (5/16/12) at 64–65, RP (5/17/12) at 31–41.

While there is no direct proof that Mr. Newcomb damaged the road that had been constructed in 2006, there is overwhelming circumstantial evidence that Mr. Newcomb did indeed knowingly and maliciously damage the road in an amount exceeding \$1500. From the uncontroverted evidence adduced at trial, Mr. Newcomb knew that Mr. Kredlo had obtained a court order that gave Mr. Kredlo the right to access his property through an easement across Mr. Newcomb's property. The relevant deeds indicate that

the easement did not just include foot traffic. Further, it reasonably can be inferred that Mr. Newcomb did not want Mr. Kredlo to be able to access his property based on the fact that Mr. Newcomb told Mr. Kredlo that his property was landlocked. Consequently, Mr. Newcomb had a motive to damage the road that accessed Mr. Kredlo's property. Lastly, no one other than Mr. Newcomb was in a position to cause the extent of damage to the road that occurred. Mr. Newcomb possessed the necessary heavy equipment to cause significant damage. While the amount of damage was not specifically delineated, all of the evidence points to an amount greater than \$1500.

Taken together, even if one totally discounts the photographs that were admitted, all of the other evidence leads to the conclusion that Mr. Newcomb committed malicious mischief in the first degree. Consequently, any purported claim of error based on the confrontation clause is harmless beyond a reasonable

doubt. The Appellant's conviction for malicious mischief in the first degree should be sustained.

3. Mr. Newcomb's due process right was not violated at the restitution hearing.

The Appellant argues that "[d]ue process guarantees the right to confront witness at post-conviction hearings unless the court finds good cause not to permit cross-examination." Appellant's Brief at 10. The Appellant cites State v. Abd-Rahman, 154 Wash. 2d 280, 111 P. 3d 1157 (2005), for this proposition. However, Abd-Rahman is not exactly on point, because it deals with a sentence modification hearing. State v. Pollard, 66 Wash. App. 779, 834 P. 2d 51 (1992), more directly addresses the appropriate standard for conducting restitution hearings. Specifically, Pollard states:

Although the Rules of Evidence do not apply at restitution hearings, the evidence presented to the trial judge must nevertheless be sufficient to support

a finding of restitution in the amount ordered. Evidence admitted at a sentencing hearing must nevertheless meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented, and requiring that the evidence be reliable.

66 Wash. App. at 784–785.

Further, “when the evidence is comprised of hearsay statements, the degree of corroboration required by due process is not ‘proof beyond a reasonable doubt,’ but rather proof which gives the defendant a sufficient basis for rebuttal.” State v. Kisor, 68 Wash. App. 610, 620, 844 P. 2d 1038 (1993).

Under the standard articulated in Pollard and Kisor, there is not a requirement that mandates that the individuals who provided restitution estimates testify in court. All that is necessary is that the defendant be given a sufficient basis for rebuttal. The four estimates that were filed with the court were from Lodestone

Construction Inc., Anderson Construction, CH Wildhaber Construction, and Johnson and Sons' Excavating. See Appendix E.

All of these estimates were from companies that repair roads. The Lodestone Construction, Inc. estimate indicates that the repair will require about 200 tons of crushed rock. The Anderson Construction estimate states that rock will be placed approximately six inches deep on 1050 feet of driveway. The CH Wildhaber estimate states that equipment rental will be billed at \$85.00 per hour. This estimate further indicates that removal of brush and debris from 1200 feet of road material will take 50 hours. This estimate also states that one load of rock will be necessary for every 20 feet of roadway, i.e., 60 loads of pit run rock will be needed. Additionally, this estimate says that eight hours will be necessary to move equipment and level the rock. Finally, the Johnson & Sons' Excavating estimate states that 1050 feet of road will need to be restored. This estimate indicates that

brush will be cleared and piled and that six inches of rock will be spread on the restored site.

Although these four estimates vary in detail, these estimates provided enough detail to give the defendant a sufficient basis to rebut the proffered estimated costs. While these estimated repair costs were not excruciatingly detailed and did not address every conceivable nuance pertaining to the reconstruction of the road, they do meet the test articulated in Pollard and Kisor. The defendant had enough information to rebut the accuracy of the estimates. Thus, there was no due process violation, and a new restitution hearing should not be granted. The restitution order should be upheld.

4. The trial court did not exceed its authority by ordering restitution that was almost double the amount established at the restitution hearing.

The trial court has discretion to determine the amount of restitution. State v. Mark, 36 Wash. App. 428 433, 675 P. 2d 1250 (1984). A restitution order is reviewed by an appellate court under an abuse of discretion standard. A restitution award can be overturned only when the trial court's exercise of discretion is manifestly unreasonable or when the trial court exercised its discretion on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash. 2d 12, 26, 482 P. 2d 775 (1971). Restitution need not be proven with specific accuracy, provided that there is sufficient evidence to form a reasonable basis for estimating the loss. Mark, 36 Wash. App. at 434. "[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, . . . " RCW 9.94A.753(3). If a defendant disputes a restitution amount, the damages must be proven by a preponderance of the

evidence. State v. Griffith, 164 Wash. 2d 960, 965, 195 P. 3d 506 (2008).

The gravamen of the Appellant's argument regarding restitution is that the trial court cannot "arbitrarily double the restitution amount and thereby grant the alleged victim a windfall." Appellant's Brief at 13. The statute in question reads as follows: "The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3). The Appellant asserts that the plain language of this "doubling provision" imposes an upper limit on the aggregate of all restitution. Appellant's Brief at 13. According to the Appellant, "the doubling provision must be read to allow the court to compensate parties other than the victim, so long as the total award does not double the victim's loss (or the offender's gain)." Appellant's Brief at 14. The Appellant cites State v. Tobin, 161 Wash. 2d 517, 166 P. 3d 1167 (2007), and

State v. Davison, 116 Wash. 2d 917, 809 P. 2d 1374 (1991) for this proposition. In Tobin the Supreme Court allowed investigative, administrative, and resurveying costs that the victim (the State of Washington) incurred because of Mr. Tobin's actions. In Davison the Supreme Court allowed restitution for an assault victim and for the City of Seattle. Importantly, the City of Seattle was deemed to be a victim. Davison, 116 Wash. 2d at 921. Neither of these cases implies that restitution can "compensate parties other than the victims." Appellant's Brief at 14. Thus, these two cases cited by the Appellant are inapposite and do not support the Appellant's claim. Interestingly, if anything, the language of Davison contains a broad interpretation of the restitution statutes that supports the trial judge's ruling in this case. The following quotation drives home this point:

The very language of the restitution statutes indicates legislative intent to grant broad powers of restitution. . . . Our interpretation of the statutes requires the defendant

to face the consequences of his criminal conduct. . . . We will not give the statutes an overly technical construction that would permit the defendant to escape from just punishment.

Davison, 116 Wash. 2d at 920, 922.

In short, the Appellant reads “the plain language” of the restitution statutes to prevent any restitution to victims beyond what has been proven based on easily ascertainable damages. Appellant’s Brief at 15. For the Appellant, the “doubling provision” only applies to individuals who are not victims.

While the Appellant’s novel interpretation of the restitution statutes might be deemed by some to be salutary, it conflicts with the actual language of RCW 9.94A.753(3). This statute specifically refers to the victim’s loss and explicitly states that this amount can be doubled. The Appellant has not cited any case where this “doubling provision” was limited to individuals who were not victims. Thus, the “doubling provision” of RCW 9.94A.753(3)

should not be construed to restrict restitution for victims. This “doubling provision” should be viewed as a vehicle to accomplish the purpose of the restitution statutes which are meant to be applied broadly using a wide scope without overly technical construction. Davison, 116 Wash. 2d at 920–922.

Of course, statutory language should not be interpreted so broadly as to allow a trial court to act arbitrarily. In this regard, the “doubling provision” gives the trial court some “wiggle room” in determining what constitutes a just amount after easily ascertainable damages have been determined. The Appellant’s position undercuts the intent of the restitution statutes since a victim could not receive compensation for any damages which likely occurred but are not easily ascertainable. Thus, the Appellant’s viewpoint restricts restitution awards when the intent of the restitution statutes is to justly compensate victims. To that end, the “doubling provision” gives the trial court leeway to

accomplish that purpose. Consequently, the Appellant's misreading of the relevant statutory language should be rejected.

To be sure, the Appellant is not without a remedy. To the extent that a trial court arbitrarily increases a restitution amount, a defendant can appeal that decision based on an abuse of discretion. In this case, however, the trial court did have a basis to increase the restitution award. At the trial, there was conflicting testimony as to the damage sustained by Mr. Kredlo. The lowest amount indicated was about \$7,000. RP (5/16/12) at 66. At the restitution hearing, estimates of the damage to the road ranged from \$9,378.60 to \$21,484.54. See Appendix E. In addition, Mr. Kredlo, at the restitution hearing, indicated that a travel trailer which he purchased for \$3,500 a month before the road was destroyed was a total loss. RP (10/5/12) at 3-5. Mr. Kredlo asserted that his travel trailer was destroyed through the

accumulation of mold, because he could not reasonably access his property and provide power and water for the travel trailer. Id.

The trial court refused to accept Mr. Kredlo's argument. RP (10/5/12) at 16. Instead, the trial court essentially took the lowest figure for road damage and increased the overall amount to \$13,000. In making this decision, the trial court reasonably exercised its discretion because there were other damage estimates that went as high as \$21,484.54. The \$13,000 restitution award was not unreasonable given the damage estimates, i.e., there was substantial credible evidence to support the restitution award. The fact that the trial court settled on an amount that was roughly equivalent to what Mr. Kredlo was seeking does not make the trial court's decision improper. The trial court specifically stated that there was too much of a "grey area" to award restitution for Mr. Kredlo's travel trailer. RP (10/5/12) at 16. The trial court properly relied on the "doubling

provision” of RCW 9.94A.753(3) to arrive at a just restitution award, that was less than two times the “easily ascertainable” damages. The trial court did not abuse its discretion in ordering \$13,000 in restitution; therefore, the restitution order should be upheld.

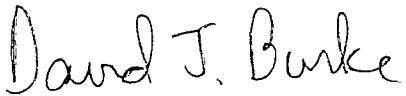
E.

CONCLUSION

Based on the analysis delineated above, the argument of the Appellant pertaining to the confrontation clause and due process should be rejected. The Appellant’s constitutional rights were not violated. Additionally, any purported error was harmless. Finally, the trial court did not abuse its discretion in using the “doubling provision” of RCW 9.94A.753(3) to award \$13,000 in restitution. Thus, the decision of the trial court should be affirmed.

Dated this 16th day of August 2013.

Respectfully Submitted,



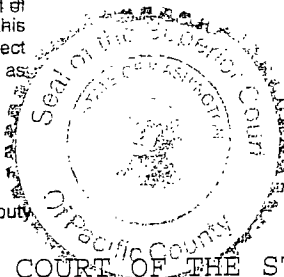
David J. Burke-WSBA#16163

Pacific County Prosecuting Attorney

I, Virginia A. Leach, County Clerk and Clerk of the Superior Court of Pacific County, Washington, DO HEREBY CERTIFY that this document, consisting of 3 page(s), is a true and correct copy of the original now on file and of record in my office and, as County Clerk, I am the legal custodian thereof.

Signed and sealed at South Bend, Washington this date:

2 3 - 12-12
Virginia A. Leach, County Clerk
By James B. Finlay Deputy



APPENDIX A

FILED

2005 NOV -4 AM 8:59

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

PETER N. STONE and AMY C.
STONE, husband and wife, and
RICKI BAYNE, a single person,

Plaintiffs,

vs.

EILEEN S. NEWCOMB, a single
person, and SCOTT R. NEWCOMB,
a single person,

Defendants.

NO. 04-2-00404-9

DECREE

05 9 00419 1

This matter having come on for trial before the undersigned the 1st day of November, 2005 and Plaintiffs appearing in person and being represented by James B. Finlay, their attorney of record, and neither Defendant appearing nor being represented by counsel and the court having taken testimony of witnesses, introduced exhibits into evidence, heard argument of counsel, and having made and entered its Findings of Fact and Conclusions of Law, and being fully advised, now therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs be and they hereby are awarded a permanent injunction against Defendants, and each of them, as follows:

1. Defendants are enjoined from in any manner whatsoever interfering with Plaintiffs' and/or their successors

1 in interest use of the following described easement to
2 benefit the following:

3 The South 900 feet of the Southwest quarter
4 of the Southeast quarter lying Westerly of
5 the Thread of the South Fork of the Palix
6 River in Section 27, Township 13 North,
7 Range 10 West of W.M., Pacific County,
8 Washington.

9 TOGETHER WITH an appurtenant non-exclusive
10 easement for ingress, egress and utilities
11 as set forth on deed recorded in Volume
12 9005 at page 379.

13 for the purpose of ingress, egress and utilities.

14 2. Defendants are further enjoined from in any manner
15 interfering with Plaintiffs' improvement of said easement.

16 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
17 Plaintiffs be and they hereby are awarded statutory attor-
18 ney's fees of \$200.00 and court costs in the sum of
19 \$257.90.

20 JUDGMENT SUMMARY

21 Judgment Creditors: Peter N. Stone and
22 Amy C. Stone, his wife,
23 and Ricki Bayne

24 Attorney for Judgment
25 Creditors: James B. Finlay
26 P.O. Box 755
27 Long Beach, WA 98631

28 Judgment Debtors: Eileen S. Newcomb
P.O. Box 217
Allegany, OR 97407

Scott R. Newcomb
General Delivery
Bay Center, WA 98527

Judgment:

Court costs: \$ 257.90
Attorney's fee 200.00

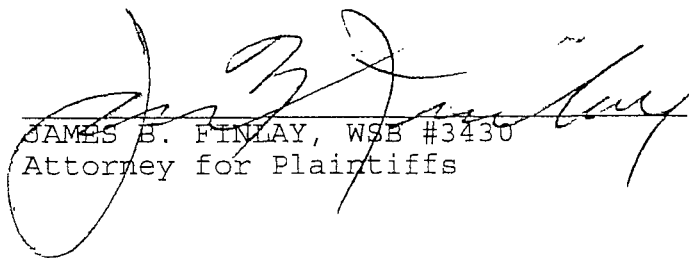
TOTAL \$ 457.90

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DONE IN OPEN COURT this 4th day of November,
2005.


J U D G E

Presented by:


JAMES B. FINLAY, WSB #3430
Attorney for Plaintiffs

APPENDIX B

FILED
Pacific County, WA

MAY 16 2012

Virginia Leach, Clerk
By Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SCOTT ROSS NEWCOMB,

DOB: **07/03/1971**

Defendant.

NO. **08-1-00161-8**

AMENDED INFORMATION

RCW 9A.48.070(1)(a)

COMES NOW DAVID J. BURKE, Prosecuting Attorney for Pacific County,
Washington, by and through Michael N. Rothman, Senior Deputy Prosecutor, and
accuses the defendant of one count of Malicious Mischief in the First Degree,
committed as follows:

COUNT I

The defendant, SCOTT ROSS NEWCOMB, on or about October 13, 2006
through October 16, 2006, in the County of Pacific, State of Washington, did
knowingly and maliciously cause physical damage in an amount exceeding one
thousand five hundred dollars (\$1,500.00) to the property of another; to-wit: did
damage a road


Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362

164

1 and/or easement and/or improvement belonging to Tim Kredlo, in violation of RCW
2
3 9A.48.070(1)(a).

4 The maximum sentence for this crime is confinement in a state correctional
5
6 institution for ten years, a fine of \$20,000.00, or by both such confinement and fine.
7

8 DONE this 15 day of May, 2012.
9

10
11
12 
13 _____
14 MICHAEL ROTHMAN, WSBA#33048
15 Senior Deputy Prosecuting Attorney
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

APPENDIX C

FILED

2012 APR 20 PM 1:33

CLERK OF SUPERIOR COURT
COUNTY OF PACIFIC, WASH.

BY DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR COUNTY OF PACIFIC

STATE OF WASHINGTON,)
)
Plaintiff,)
)
v.)
)
SCOTT ROSS NEWCOMB)
)
Defendant.)
_____)

NO. 08-1-00161-8

COURT'S DECISION ON
DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE

The Court has reviewed counsels' memorandums, the records and files therein, including the published opinion of the Court of Appeals, Division II and its Mandate of August 26, 2011.

On November 23, 2009, this Court dismissed this action upon a Knapstad motion by then counsel, Harold Karlsvik. The State appealed and the Court of Appeals reversed the trial court and the matter was sent back for further prosecution.

The Court of Appeals, in its published opinion, No. 40056-I-II, stated, in part, the following facts:

- 1) "The following summer, Kredlo added a gravel road. . . to the easement." at p. 2;
- 2) "Kredlo returned to the property a few months later and found Newcomb on a payloader scraping gravel from the road." at p. 2;

- 3) "After reporting the incident to the sheriff. . ." at p. 2;
- 4) "Kredlo provided the sheriff's office with a repair estimate. . ." at p.2;
- 5) "Easements are property rights or interests that give their holder limited rights to use but not possess the owner's land. . ." at. p. 6;
- 6) "We acknowledge that no published authority in Washington holds that damaging improvements to an easement can support a charge of malicious mischief." at p. 7;
- 7) "Washington law clearly provides, however, that the easement at issue created an interest in real property." at p. 7;
- 8) "Moreover, when Kredlo paid for improvements to the easement, he gained a possessory interest that further affected Newcomb's ownership rights." At p.7.

Findings of Fact

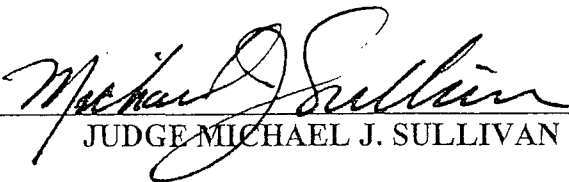
- 1) There is no contest that the easement granted to Kredlo is a lawful easement;
- 2) The Court of Appeals published opinion clearly grants Kredlo some form of property rights in the easement based upon their statements, above;
- 3) Law enforcement were responding to Kredlo's report to the Sheriff's office;
- 4) Kredlo followed up with an estimate of damages provided to the Sheriff's office;

Conclusions of Law

- 1) Law Enforcement were "invited" to go upon the easement by the Kredlos who had a property interest in the property and, therefore, the right to grant such permission, in this case by reporting the incident to the Sheriff;

2) Either under the Kredlo's rights as holder of a non-exclusive easement or as holding a property interest in the easement, thereby depriving Mr. Newcomb (or his mother) of sole ownership rights, the Kredlos had authority to expect the Sheriff to respond to their complaint, go to the sight via the Kredlo's easement and view and photograph from their location upon the easement.

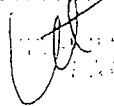
Decided April 20, 2012.


JUDGE MICHAEL J. SULLIVAN

APPENDIX D

FILED

2012 MAY 25 PM 12:33


JUDGE MICHAEL J. SULLIVAN
COUNTY OF PACIFIC, WA
BY _____ DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR COUNTY OF PACIFIC

STATE OF WASHINGTON,

Plaintiff,

v.

SCOTT ROSS NEWCOMB

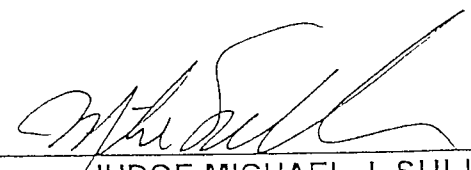
Defendant.

NO. 08-1-00161-8

VERDICT AFTER
BENCH TRIAL

The Court heard Mr. Newcomb's bench trial May 16-17, 2012. The Court took its decision under advisement. The Court set May 25, 2012 to announce its verdict in open court and now renders the verdict of Guilty of Malicious Mischief in the First Degree.

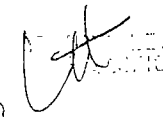
Declared in Open Court this 25th day of May, 2012.



JUDGE MICHAEL J. SULLIVAN

FILED

2012 MAY 25 PM 12:33


DEPUTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR COUNTY OF PACIFIC

STATE OF WASHINGTON,)	
)	NO. 08-1-00161-8
Plaintiff,)	
)	COURT'S FINDINGS AND
v.)	CONCLUSIONS OF LAW
)	TO SUPPORT VERDICT
SCOTT ROSS NEWCOMB)	
)	
Defendant.)	

The Court Mr. Newcomb's bench trial May 16-17, 2012. The Court took its decision under advisement. The Court set May 25, 2012 to announce its verdict in open court.

FINDINGS OF FACT

1. The victim had legal interest and right in said easement to improve said easement with a viable, travelable roadway for victim's ingress and egress to victim's lots.
2. The Court found the testimony of the witnesses credible.
3. The witnesses differed somewhat in their remembrance of the facts which is understandable as the alleged criminal act occurred approximately six (6) years ago.
4. The road work, including the spreading of rock and gravel by the victim's contractor, was destroyed by the defendant's intentional removal of most of said road work that victim had paid to have completed.

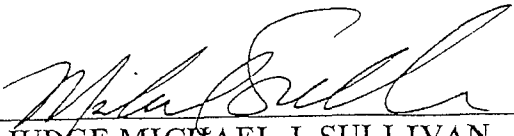
5. There was disagreement as to which portion(s) of victim's improved roadway over the easement was included in Exhibit 1.
6. The contractor testified on day two of the trial, that upon further review of his files which he did not have with him the first day of trial, his written estimate [See Exhibit 1] included reworking the roadway (laying more rock and gravel to code) that the defendant had destroyed and that it did not include additional rocking for a portion of roadway on victim's furthest lot that was not part of defendant's illegal actions.
7. The Court carefully observed the contractor's demeanor and his speech while testifying and found his explanation to be truthful and logical.
8. Exhibit 1 listed the cost to replace rock for driveway, equipment hours and labor to repair the roadway as \$6,738.00, plus 7.8% sales tax, for a total of \$7,263.56.
9. Exhibit 1 did not break out the separate costs for rock, equipment and labor.
10. The defendant did remove much, if not all, of the rock and gravel that victim's contractor had laid upon an easement granted by deed unto the victim and predecessors in interest.
11. The Court can make a reasonable inference from the evidence that the amount of damage to the victim's improved roadway over victim's easement was well in excess of \$1,500.00.

CONCLUSIONS OF LAW

1. The State has proven each element of Malicious Mischief in the First Degree beyond a reasonable doubt.
2. Therefore, the Defendant is guilty of Malicious Mischief in the First Degree as charged in the amended information.

These Findings and Conclusions are not exhaustive. The State shall, and Defendant may, submit their Proposed Findings and Conclusions one week before Sentencing. The Court will hear argument on said Findings and Conclusions at Sentencing.

Declared in Open Court this 25th day of May, 2012



JUDGE MICHAEL J. SULLIVAN

FILED

2012 JUN 12 PM 2:48

PACIFIC CO. WA

BY [Signature] CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

VS.

SCOTT ROSS NEWCOMB,

Defendant.

NO. **08-1-00161-8**

RESTITUTION ESTIMATE
AND VICTIM IMPACT

Attached hereto are copies of the Restitution Estimate and Victim Impact Statement for the above-entitled case for the Court's consideration. A copy has been provided to the Attorney for the Defendant.

DATED this 12 day of June, 2012.

DAVID J. BURKE, Prosecuting Attorney

[Signature]
MICHAEL ROTHMAN, WSBA#33048
Senior Deputy Prosecuting Attorney

RESTITUTION ESTIMATE AND
VICTIM IMPACT

175

VICTIM LOSS CLAIM

SCOTT ROSS NEWCOMB

08-1-00161-8

Unrecovered Property: List property NOT recovered or destroyed and Actual cash value. Attach proof of value

1.	_____	\$ _____
2.	_____	\$ _____
3.	_____	\$ _____
4.	_____	\$ _____
5.	_____	\$ _____

Property Damage: List damage and associated costs and cost of repair:
(attach copies of bills or estimates)

1.	ROAD DESTRUCTION	\$ 9378 ⁶⁰ + \$ 21,484 ⁵⁴
2.	+ resurvey	\$ 800 ⁰⁰
3.	_____	\$ _____

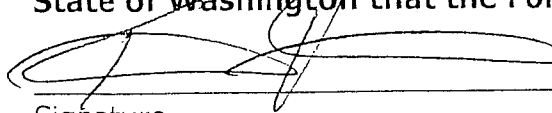
Property Insurance Information:

Insurance Company: NONE
Address: _____
Claim No.: _____
Adjuster & Phone: _____

Medical/Counseling. Note injury requiring treatment: (Attach copies of bills/insurance forms)

Injury: _____
Insurance Provider: _____
Address: _____
Total Amount Paid by Insurance: \$ _____

SIGN HERE: I declare Under Penalty of Perjury Under the Laws of the State of Washington that the Foregoing is True and Correct:

 (TIM KREDLO)

Signature

PO BOX 53 RAYMOND WA 98577-0053

Address

360-942-8770

Home Phone

Work Phone

6/11/12

Date

LODESTONE CONSTRUCTION, INC.

P.O. Box 308
Bay Center, Washington 98527

June 11, 2012

Timothy Kredlo
197 Camp One Rd.
Raymond, WA 98577

SCOPE OF WORK:

- ☒ Crushed Rock for driveway (approx. 200 tons)
- ☒ Equipment hours
- ☒ Labor hours

This Proposal is to confirm our discussion regarding the roadway repair work located off of South Palix Rd. The following agreement spells out the terms and conditions of this project. We **Estimate** the fees for our services on this project to be approx. \$9,630.12; this amount includes (7.8%) sales tax.

Please be advised that Pacific County may require permits and inspections and these additional costs are not included within our scope of work or project estimates.

Liens & Notice to Customer's: Lodestone Construction, Inc. reserves the right to lien the Customer's Property if payment is not received. To acquire additional information regarding Liens, contact the Department of Labor & Industries.

Billing will be submitted upon completion of work and payment shall be due and payable immediately upon receipt. A Finance Charge, which is computed at the periodic rate of 1.9% Monthly (Annual Percentage Rate 23%), will be assessed upon any balance owed past 30 days.

If you wish to accept this proposal, please sign below and return this original copy so we can proceed according to the terms outlined above. This offer will expire if you do not respond within 15 days.

Thank you for this opportunity to be of service. Should you have any further questions, please do not hesitate to call us (360) 875-6960 or Dan's Cell# 942-8822.

Sincerely,

Daniel J. Bayne
President
LODESTONE CONSTRUCTION, INC.

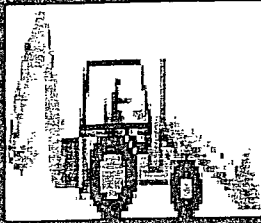
(Customer Signature)

(Date Signed)

Richard E. Anderson
P.O. Box 158 Menlo, WA 98561
360-942-7220

No. 1664

CUSTOMER ORDER NO	PHONE	DATE 6-4-12	
NAME Tim Kredlo			
ADDRESS			
CITY estimate	STATE	ZIP	
QTY	DESCRIPTION	PRICE	AMOUNT
	Clear and blade driveway,		
	haul + place 3" rock		
	approx 6' deep on 1050'		
	driveway		
		9,000.00	
		Subtotal	702.00
			9702.00
		TAX	
		TOTAL	



(360) 942-2343
(360) 942-3570

CH Wildhaber Construction

225 Cole Ave. Raymond 98577

Since 1984

**Rock of all kinds
Excavating
Driveways
Boulders**

**Land Clearing
Septic Systems
Site Prep
Landscaping**

TIM KREDLOW

JUNE 5, 2012 ESTIMATE PALIX ROAD REBUILD
EQUIPMENT RENTAL @ \$85 PER HR

REMOVE BRUSH AND DEBRIS FROM 1200 FT OF ROAD
MATERIAL TO BE TAKEN TO KREDLOW PROPERTY
2 STUMPS TO BE LEFT ON SIDE OF RIGHT-OF-WAY
AREA FOR DEBRIS SEPOSIT TO BE PROVIDED /50 HR= \$4250.00

1 LD ROCK PER 20 FT = 60 LOADS

MOVE EQUIPMENT- LEVEL ROCK-LEVEL ROAD RIGHT-OF-WAY
8 HR = \$680.00

60 LOADS PIT RUN ROCK @ \$250.00=\$15000.00

\$19930.00

\$ 1554.54 TAX

\$21484.54 TOTAL

Johnson & Sons' Excavating
P.O. Box 275
Naselle, WA. 98638

Proposal

DATE	ESTIMATE #
5/29/2012	498

NAME / ADDRESS
Tim Kredlo South Palix Rd South Bend, Wa 98586

PROJECT		
DESCRIPTION		
QTY	COST	TOTAL
1	8,700.00	8,700.00
	7.80%	678.60
TOTAL		\$9,378.60

SIGNATURE _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
 vs.)
)
 SCOTT NEWCOMB,)
)
 Appellant.)
 _____)
 STATE OF WASHINGTON)
) ss.
 COUNTY OF PACIFIC)

NO 43578-1-II

AFFIDAVIT OF
MAILING

FILED
COURT OF APPEALS
DIVISION II
2013 AUG 19 AM 9:46
STATE OF WASHINGTON
BY DEPUTY

ELAINE FOSSE, being first duly sworn on oath, deposes and says:

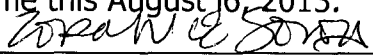
I am a paralegal for the the Pacific County Prosecutor for the
Prosecuting Attorney's Office.

That on the 16th day of August, 2013 I mailed the original and one
copy of the Brief of Respondent, postage prepaid, to David Ponzoha, Clerk,
Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402-
4454.

That on August 16, 2013 I mailed two copies of the Brief of
Respondent, postage prepaid to Jodi R. Backlund, Manek R. Mistry, Skylar T.
Brett, Attorneys at Law, Backlund & Mistry, P.O. Box 6490, Olympia, WA
98507.


Elaine Fosse

SUBSCRIBED & SWORN to before me this August 16, 2013.


NOTARY PUBLIC in and for the State
of Washington, residing at Raymond.